Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-663

ROBERT FRIAS, [redacted]L.,

Petitioners,

versus

THE BOARD OF TRUSTEES OF THE ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH SUPREME JUDICIAL DISTRICT COURT OF CIVIL APPEALS OF TEXAS

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October, 1979

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

ROBERT FRIAS, ~~ET AL.~~,
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THE BOARD OF TRUSTEES OF THE ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH SUPREME JUDICIAL DISTRICT COURT OF CIVIL APPEALS OF TEXAS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Robert Frias, ~~et al~~, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Eighth Supreme Judicial District Court of Civil Appeals at El Paso, Texas, entered in the above-entitled case on July 25, 1979.

OPINIONS BELOW

The opinion of the Eighth Supreme Judicial District Court of Civil Appeals of Texas at El Paso, Texas, is unreported and is printed in Appendix A hereto, infra, pages 2a-14a. The Order of the Supreme Court of Texas is printed in Appendix A hereto, infra, page 17a.

JURISDICTION

The judgment of the Eighth Supreme Judicial District Court of Civil Appeals of Texas (Appendix A, infra, pages 14a-15a) was entered on July 25, 1979. A timely Petition for Rehearing was denied on August 15, 1979, (Appendix A, infra, pages 15a-16a). The Dismissal for Want of Jurisdiction by the Texas Supreme Court was entered on October 3, 1979 (Appendix A, infra, page 17a). The jurisdiction of the Court is invoked under 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

Is there analogy in the cry of "fire" in a crowded theatre and a corporation without regard for the truth contributing to political associations to disseminate erroneous propaganda, thereby nullifying Petitioners' rights of freedom of expression, due process and equal protection guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Whether the court made law limiting jurisdiction to matters happening on the day of election and excluding from inquiry in an election contest the intentional misrepresentation of fact to promote the passage of a bond issue violated Contestants' constitutional rights of freedom of expression, to petition for redress of grievances, due process and equal protection guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONS AND STATUTES INVOLVED

Vernon's Annotated Texas Statutes Election Code

Article 5.01, Classes of persons not qualified to vote (Appendix B, infra, page 18a)

Article 9.30, Other contested elections (Appendix B, infra, pages 18a-19a)

Article 9.03, Notice of Contest (Appendix B, infra, page 19a)

Article 14.06, Corporations and Labor Organizations not to contribute (Appendix B, infra, pages 22a-25a)

Article 15.17, Corporation contributing (Appendix B, infra, pages 19a-22a)

Texas Constitution, Article 1 §13: Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done

him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Texas Constitution, Article 1 §15: The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

Texas Constitution, Article 1 §27: The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

Texas Constitution, Article VI §1: The following classes of persons shall not be allowed to vote in this State to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

Amendment 1 to the United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment 5 to the United States Constitution: No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Preliminarily, Petitioners respectfully request the Court to note that time is of the essence in this case. Respondents, the school trustees, are spending tax

dollars to proceed with the illegally authorized construction. All property owners within the taxing district are suffering excessive tax burdens on their homesteads and other property. Petitioners are ready to meet any schedule for briefing and oral argument that the Court may wish to set. This petition may, if certiorari is granted and the court wishes, be treated as Petitioners' Brief on its merits. It is submitted that this expedited procedure is authorized by another election case, *Ray v. Blair,* 343 U.S. 901 (1952) in which certiorari was granted on March 24, 1952, the case was argued on March 31, 1952, and a decision was announced on April 3, 1952. See 343 U.S. 154, 214.

112 pro se Contestants filed 3 statutory Notices of Contest of the December, 1978, school bond election authorizing the issuance of 21.6 million dollars in bonds by the Ector County Independent School District. Contestants claimed intentional misrepresentations of fact by the school trustees to purposely mislead the voters making it impossible to ascertain the true will of the majority of the qualified voters participating in the school bond election. The State District Court dismissed each of the pro se Contestants who were absent from the second Hearing on the Plea in Abatement or who were not ready in that hearing to go forward with the evidence in the case. Then the Court on its own motion consolidated the three Notices of Election Contest and ordered the remaining Contestants to jointly make discovery, present evidence and arguments to the court. The Contestants were denied a

jury trial on the issue of actionable fraud committed by the school trustees in disseminating false information concerning the necessity of bond issues. In a Hearing before the court, the pro se Contestants proved by stipulations and testimony and evidence that intentional misrepresentations of fact had been made by the school board. The Contestants also proved the corporate contributions to a political committee were used to publish the false information through the mass media.

The Court of Civil Appeals held that the Court's jurisdiction is limited to matters happening on the day of the election and pertaining strictly to the election. Ergo: The misleading statements and misrepresentations of facts by the school board and its employees do not constitute proper grounds for an election contest. The Court affirmed the lower court that contributions by National banks and Texas business corporations in support of the bond election do not constitute proper grounds for contest of an election. The Court of Civil Appeals held that insofar as *Article 14.06 Texas Election Code* (Supra App. B) prohibits corporations from making contributions and expenditures "for the purpose of aiding or defeating the approval of any measure submitted to vote of the people of this state or any subdivision thereof" it is unconstitutional. The Court held that an election contest is strictly a statutory right and that the Contestants were not entitled to a trial by a jury. The Court of Civil Appeals cited *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) that the prohibition of corporate expenditures to influence referen-

dum elections was an unconstitutional abridgment of free speech under the First and Fourteenth Amendments. Petitioners certify the factual circumstances in the instant case are clearly distinguishable rendering the *Bellotti* decision inapposite. The decision below clearly violates Contestants' right to procedural due process and equal protection under the First, Fifth and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

This case concerns the constitutional rights of taxpayers to effectively contest a school bond election against the absolutism by the school trustees and the controlling financial power of the Corporations. An election contest is meant to embrace any type of suit in which the validity of an election or any part of the elective process is the subject matter of the litigation. *Clary v. Hurst,* 138 S.W. 566 (Tex. Sup. 1911) The statutory remedy for contesting elections for irregularities or fraud is exclusive of all others. *Texas Election Code,* art. 9.30 (infra Appendix A pages 18a-19a); *Slater v. Ellis County Levee Improvement District,* 36 S.W.2d 1014, 1017 (Tex. Comm. Ap. 1931, Op. Adpt.) Against these precedential limitations 112 pro se Contestants filed 3 Notices of Contest of the December, 1978, school bond election. Contestants in their sworn petitions alleged the school trustees, Respondents, and their employees intentionally misrepresented facts concerning the

needs of the school district. Contestants also alleged local banks and Texas business corporations through their contributions funded the dissemination of these misrepresentations. The Contestants' constitutional rights of equal protection under the Fourteenth Amendment were denied by the lower court's refusal to exclude from counting the votes cast by constitutionally and statutorily disenfranchised voters. Article VI §1 of the *Texas Constitution;* Article 5.01 *Texas Election Code; Richardson v. Ramirez,* 418 U.S. 24 (1974).

The Court of Civil Appeals judicially construed the Texas Election Code further limiting these Contestants to only matters that happened on the day of the election and pertaining strictly to the election as subject to inquiry or determination by the court in an election contest. Contestants are constitutionally entitled to access to the courts to seek redress for the admitted misrepresentations of facts by Respondents prior to the election day and other specified irregularities in the election process. The entire election process is a proper matter for inquiry in a contested election. *Dickson v. Strickland,* 65 S.W. 1012, 1018 (Tex. Sup. 1924). Petitioner's constitutional claim is based on the cumulative effect of procedural rulings denying Contestants access to the courts in violation of their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. The Courts' denial of the jury trial violated Petitioners' constitutional right to a trial by jury. Article I §15 *Texas Constitution:*

"The right of trial by jury shall remain inviolate . . ." Vernon's Texas Constitution

These Contestants were relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. The Texas Election Code requirements for minimum time of giving notice of election and absentee balloting negate this judicial limitation of contest of the election process to the day of balloting only.

The First Amendment to the United States Constitution (supra, page 4) is a constitutional mandate that all courts shall be open and that every person for an injury done him shall have remedy by due course of law. The Texas Election Code as judicially interpreted precluded the exercise of fundamental rights and liberties explicitly protected by the Constitution. Petitioners ask this court to give this constitutional right of access to courts no less protection than the Constitution itself demands which is strict judicial scrutiny under the equal protection clause of the Fourteenth Amendment. Federal Courts sit to enforce the constitutional rights of all persons. Individuals have the right to petition the government for redress of grievances. *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

It is important that all persons have right of access to the courts. *Bounds, Correction Commissioner v. Smith*, 403 U.S. 817 (1977) holding prisoners have a constitutional right of access to court; *Fuentes v. Shevin and Parham v. Cotese*, 407 U.S. 67 (1972) granting the right of hearing before the loss of possession of chattels; *Boddie v. Connecticut*, 401 U.S. 371 (1971) holding the State denied due process of law to indigent persons by requiring payment of fees to file divorce actions; *Goldberg v. Kelley*, 397 U.S. 254 (1970) procedural due process under the 14th Amendment requires evidentiary hearing before termination of benefits. The fundamental right of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965).

Dunn v. Blumstein, 405 U.S. 330 (1972) fully canvasses this Court's voting rights cases and explains that "this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.". Id., at 336. Corporate contributions vitiate the equality of participation.

The state court's judicial limitation of the scope of an election contest to the day of balloting precludes appropriate retribution for the erroneous propaganda by the school officials which intentionally misled the voters to vote for the bond issues. The mass proliferation of misleading information by the indiscriminate corporate contributions to an irresponsible political committee narrowly passed these bond issues; although, the same bond issues had failed to pass on three previous occasions. The imposition of an excessive tax burden on

the property owners of the school tax district resulted from contributions by corporations which failed to be responsible for the *truthfulness* of the information disseminated by the political committee. This had a deleterious effect on the voters.

"The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and *truthfully* all matters of public concern. . ." (emphasis added). *First National Bank of Boston v. Bellotti,* 435 U.S. 765 at 776 (1978). *Bellotti* gave no perimeters of the First Amendment freedoms of a corporation — but the Court did reiterate its limitations on the quality of the speech protected. In the instant case, the misrepresentations were made by individuals but the power of misleading the voters was the corporate contributions. There is no question of the impact of this corporate financial power in the December, 1978, school bond election. *Buckley v. Valeo,* 424 U.S. 1 at 14 (1976) indicates the importance of the distinction between "expenditures" and "contributions."

Some forms of commercial speech regulation are still permissible. Appropriate time, place and manner restrictions may be imposed on commercial speech and false or misleading advertisements may be forbidden. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 at 770-72 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350, 383-84 (1977); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 93-94 1977); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 453 (1978). In *Virginia Board of Pharmacy* the Court observed:

> Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream from commercial information flow cleanly as well as freely. 425 U.S. at 771-72.

To permit a corporation to irresponsibly contribute to political associations is analogous to allowing an individual to shout "fire" in a crowded theatre. This corporate financial power not only threatened but did in fact undermine a democratic process thereby denigrating rather than serving First Amendment interest. Categorically, the record in the instant case substantiates Mr. Justice White's argument that because corporations are given certain privileges by law they are able to "amass wealth" and then to "dominate" debate on the issue. (435 U.S. at 809, 821). The Texas Legislature in 1977 amended Article 14.06 (infra. Appendix B pages 22a-25a) and Article 15.17 (infra. Appendix B pages 19a-22a) of the Texas Election Code limiting corporate expenditures because Texas recognized that corporations would use their economic power to obtain further benefits beyond those already bestowed by the Business Corporation Act.

Bellotti stated, "preserving the integrity of the electoral process, preventing corruption, and sustaining

the active alert responsibility of the individual citizen in a Democracy for the wise conduct of government are interests of the highest importance." (435 U.S. 788-789). This interest of "preventing corruption" has been destroyed in the instant case. The school trustees stipulated to their misrepresentations of fact, and corporate contributors blatantly testified to their irresponsibility for the erroneous information magnified by their unlimited contributions.

"Question: [Contestant] Had you known the information you were receiving was incorrect or incomplete would you still have contributed?

Answer: [Mr. Jumper, President of National Bank of Odessa] That is conjecture. I don't know."

(Excerpt from Statement of Facts vol. one, pg. 223, Hearing of 3-13-79)

"Question: [Contestant]: If you had wished to make a $10,000.00 contribution, Mr. Jumper, would you have had the authority with which to make it?

Answer: [Jumper]: Yes, sir."

(Excerpt from Statement of Facts Vol. one, pg. 216, Hearing of 3-13-79)

This testimony verifies the irresponsible corporate contributions to control the voters in the school bond election.

CONCLUSION

Wherefore, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to the Eighth Supreme Judicial Court of Civil Appeals of Texas in *Frias, et al v. The Board of Trustees of the Ector County Independent School District, et al.* In the event that the Petition is granted, Petitioners pray that the judgment of the court below be reversed, that the cause be remanded, and that the court below be directed to allow the Contestants in an election access to the courts for redress of their grievances from the day of the calling of the election to the time of certification of the results of the election; and that the court below be directed to limit the exercise of First Amendment rights to the standard of Truth.

Respectfully submitted,

GLORIA TANNER SVANAS
Attorney for Petitioners
1813 East Eighth Street
Odessa, TX 79761

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT three true and correct copies of the above and foregoing Petition for Writ of Certiorari have this the ____ day of October A.D., 1979, been placed in the United States mail postage prepaid, addressed to the Honorable Robert B. Cox, McMahon, Cox, Todd, Tidwell and Bangert, P.C., Attorneys at Law, Post Office Box 1311, Odessa, Texas 79760, and to the Honorable Mike Atkins, County Attorney, 223 Ector County Courthouse, Odessa, Texas 79761.

GLORIA TANNER SVANAS

APPENDIX "A"

COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT

El Paso, Texas, July 25, 1979

Hon. Gloria T. Svanas
Attorney at Law
1813 East Eighth Street
Odessa, Texas 79761

Madam:

You are hereby notified that, in the case of ROBERT FRIAS, Appellant, vs. BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL., Appellees, our No. 6900, from Ector County, the following decision and order was this day made and entered by the Court:

The Honorable Court of Civil Appeals today rendered judgment affirming the judgment of the trial Court.

Respectfully yours,

ANNE D. RAY, Clerk

COURT OF CIVIL APPEALS
EL PASO

ROBERT FRIAS,

Appellant,

versus No. 6900

BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees.

Appeal from the District Court
of Ector County, Texas

OPINION

This is a contest of a school bond election in which a majority of the votes cast were in favor of authorizing the Ector County Independent School District to issue 21.6 million dollars in bonds. The funds raised by the issuance of the bonds were to be used primarily for extensive renovating and refurbishing of existing buildings, the construction of two new elementary schools and one new junior high and for a new athletic stadium. On the ballot, Proposition No. One called for $8,754,563.00 in bonds for additions and improvements at existing facilities, Proposition No. Two called

for $9,293,193.00 in bonds for new school construction, and Proposition No. Three called for $3,500,000.00 in bonds for the new sports complex. The estimated cost of the issuance of the bonds was $53,000.00. Proposition No. One passed by more than 1,000 votes, No. two by more than 750 votes, and No. Three by more than 400 votes, all out of a total of more than 17,000 votes.

This case began with 111 pro se Contestants. At a pre-trial hearing, only 11 Contestants indicated they would present any affirmative evidence in the case and all others were dismissed. Only 1 of those 11, Robert Frias, has filed an appeal bond and he is the only party before the Court on this appeal, although Contestant's brief purports to be on behalf of 106 Contestants. Rules 354, 356, Tex.R.Civ.P.; Davies v. Massey, 561 S.W.2d 799 (Tex. 1978); Owen v. Brown, 447 S.W.2d 883 (Tex. 1969); Warren v. Kyle, 565 S.W.2d 313 (Tex.Civ.App.—Austin 1978, no writ); Roth v. Maryland American General Insurance Company, 454 S.W.2d 779 (Tex.Civ.App.—San Antonio 1970, writ ref'd).

The trial Court, after a lengthy trial, denied all relief sought by the Contestants, and upheld the bond election and the results thereof which favored the issuance of the bonds. The Court subsequently filed Findings of Fact and Conclusions of Law, and amended findings of fact and conclusions of law. The judgment recites:

The Court, having previously refused Contestants' request for trial by jury, and after presentation of the testimony, evidence and arguments has found that Contestants have failed to prove by a preponderance of the legal and competent evidence (1) a fraudulent election; (2) that there were any invalid votes cast in such election sufficient to change the results thereof; or (3) that a determination of the true will of a majority of the qualified voters in such election is impossible. Based on such findings the Court is of the opinion that judgment should be rendered in favor of Contestees.

Appellant's first point of error asserts the trial Court erred in not finding as a matter of law that the entire election process is a proper matter for inquiry in a bond election contest. This is basically an attack upon the Court's Conclusion of Law No. 1 which holds:

1. Misleading statements and misrepresentations of facts by Contestees and school district employees alleged to have occurred prior to the December 5, 1978 bond election did not constitute any proper grounds for an election contest, as only such matters as happened on the day of the election and pertain strictly to the election itself are within the Court's jurisdiction and may be inquired into or determined by the Court in an election contest.

Appellant relies primarily upon Dickson v. Strickland, 114 Tex. 176, 265 S.W. 1012 (1924), where the court said:

> An election contest necessarily involves questions of both fact and law. It may be predicated upon a status or upon facts which existed before an election, upon what took place at the election, and perhaps in some instances upon a status or what took place after an election. The ineligibility of a candidate before an election whether arising from lack of age, or from personal misconduct, or other infirmities, the manner of giving notice of the election, appointing election officers, their qualification, the creation of election districts, the preparation of the polls or polling places, the manner in which the ballots may have been prepared, and various other things which of necessity precede an election, are all well known subjects of election contests.

Other courts have held that jurisdiction in election contests is limited to such matters as tend to show that the election was not properly ordered or fairly conducted, such as the failure to give notice of the time and place where the election is to be held or that illegal votes were cast thereat, or some other matter which would impeach the fairness of the result. Trimmier v. Carlton, 264 S.W. 253 (Tex.Civ.App.—Austin 1924), aff'd 116 Tex. 572, 296 S.W. 1070 (1927).

The more recent rule is that only matters that happen on the day of the election and pertain strictly to the election may be inquired into or determined by the court in an election contest. Harrison v. Jay, 280 S.W.2d 636 (Tex.Civ.App.—Eastland 1953), aff'd 153 Tex. 460, 271 S.W.2d 388 (1954). The most recent case to consider the issue is Stelzer v. Huddleston, 526 S.W.2d 710 (Tex.Civ.App.—Tyler 1975, writ dism'd), where the court said:

> Elections may be contested only on grounds expressly or impliedly authorized by the Election Code. 21 Tex.Jur.2d Elections, sec. 158, p. 413. Article 9.15 of the Texas Election Code authorizes the courts to declare an election void in those instances where it appears that it is impossible to ascertain the true result of an election and in instances where such a number of legal voters were, by the officers or the managers of the election, denied the privilege of voting so as to change the result of the election. In an election contest only such matters as happened on the day of the election and pertaining strictly to the election itself may be inquired into or determined by the courts. Harrison v. Jay, 153 Tex. 460, 271 S.W.2d 388 (1954); Oser v. Cullen, 435 S.W. 2d 896 (Tex-.Civ.App., Houston, 1968, dismissed). We fail to find any evidence showing that any of the school's trustees or any other official of the School District stated to the public that only a

> 'slight' increase of taxes would be necessary to support the bond issue. But even if such were the case, under the foregoing rules of law, such alleged misleading statements being made prior to the election could not be inquired into or considered by the court.

Recognizing the conflict in these cases, we feel compelled to follow the more recent authorities. As noted in an article by Josias Wheat entitled "The Statutory Election Contest," 21 Texas Bar Journal 629 (1958), "The great weight of authority of this state would appear to be * * * that the courts' jurisdiction is limited to matters happening on the day of the election and pertaining strictly to the election." Even if we should be wrong in this regard, the election was a correct and proper one for reasons hereafter discussed under the remaining points of error. Point of Error No. 1 is overruled.

The next point asserts the trial Court erred in finding that the misleading statements and material misrepresentations of fact by school trustees and school employees made it impossible to ascertain the true will of the majority of the voters. In this case, which was required to be tried to the Court as a statutory procedure, the trial Judge was necessarily the trier of facts and he determined the credibility of witnesses and the facts which were proven. His second and fourth Findings of Fact state:

2. No material misrepresentations of fact or misleading statements were made by Contestees or the employees of such school district prior to the December 5, 1978 school bond election.

* * *

4. There were no illegal or fraudulent votes cast in the December 5, 1978 school bond election.

The evidence supports those findings. Even if we consider matters which might have affected the election at times prior to election day, there is no proof that those matters were of such nature as to affect the result of the election. There is no proof of any fraud, and no voters testified that they were misled or believed what is now contended to be misrepresentations or that such affected their vote. In Marks v. Jackson, 130 S.W.2d 925 (Tex.Civ.App.—Galveston 1939, writ dism'd), the court considered a contest of a school bond election and said:

> Two well-settled rules of law governing such controversies as the one at bar may be thus stated:
>
> (1) '* * * In a statutory election contest within the purview of cited chapter 9, title 50, article 3041 et seq., of our Revised Statutes, such as this one was, the scope of the court's

> inquiry is limited to matters pertaining strictly and directly to the election itself, together with happenings on the date thereof, such as the casting and counting of ballots voted therein, as well as the action and conduct of the officers holding it.' Border v. Abell, Tex. Civ.App., 111 S.W.2d 1186, 1188, writ of error refused.
>
> (2) In an election-contest, the burden is on the contestants to allege and prove either that a different result should have been reached by counting or not counting certain specified votes; or that the irregularities in the conduct of it were such as to render it impossible to determine the true will of the majority of the voters participating in the election; and irregularities in the conduct of the election, which cannot be demonstrated to have materially affected the result, are immaterial. Hill v. Smithville, etc., (Tex.Com.App.), 251 S.W. 209; Kincannon v. Mills, (Tex.Civ.App.), 275 S.W. 1083, 1084; McCormick v. Jester, 53 Tex.Civ.App. 306, 115 S.W. 278; State v. Etheridge (Tex.Civ.App.), 20 S.W.2d 808; State v. Fletcher (Tex.Civ.App.), 50 S.W.2d 450; Wilmarth v. Reagan (Tex.Civ.App.) 231 S.W. 445.

Point of Error No. 2 is overruled.

The next point asserts the trial Court erred in not requiring the exclusion of all votes cast by disqualified voters as specified by the Texas Constitution. Article VI, section 1, of the Texas Constitution and Article 5.01 of the Texas Election Code does prohibit certain classes of people, such as idiots and lunatics, paupers and convicted felons from voting in an election. The argument under this point seems to be based upon a motion filed by Contestant, George Roeder, to declare the election void. In the first place, this Contestant did not appeal the Court's ruling on his motion, and he is not before this Court as an Appellant. The trial Court found that no illegal or fraudulent votes were cast in the bond election and the evidence supports that finding. The one Contestant who has appealed had the burden of proof to show that there were enough illegal votes cast to change the results of the election. There is no proof to meet that burden in this case. Merely alleging irregularities does not meet the burden of proof. Fox v. Nail, 294 S.W.2d 407 (Tex.Civ.App.—El Paso 1956, no writ). Point of Error No. 3 is overruled.

The next point asserts the trial Court erred in finding that corporate contributions in violation of Texas Statutes were permissible in the school bond election. Article 14.06 of the Texas Election Code makes it unlawful for corporations and labor organizations to make a contribution or expenditure for a political committee. In this case, there was a political committee, named United for Odessa, which received contributions from several corporations and used such money to promote passage of the bond issue.

Only last year, the United States Supreme Court in First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), held a Massachusetts statute prohibiting corporate expenditures to influence referendum elections to be an unconstitutional abridgment of free speech under the First and Fourteenth Amendments. See "Corporations' Right to Free Speech in Referendum Elections: First National Bank v. Bellotti," 32 Sw. L. J. 1359 (1979).

On June 6, 1978, the Attorney General of Texas in Opinion No. H-1175, based largely upon the holding in Bellotti, said:

> Insofar as article 14.06 Texas Election Code, prohibits corporations from making contributions and expenditures 'for the purpose of aiding or defeating the approval of any measures submitted to a vote of the people of this state or any subdivision thereof,' it is unconstitutional.

We conclude that that opinion is correct. Point of Error No. 4 is overruled.

The next point asserts the trial Court erred in denying Contestants' constitutional right of trial by jury. Both the Seventh Amendment to the United States Constitution and Article I, Section 15, of the Texas Constitution guarantee the right of a trial by jury. But

those provisions were enacted to protect rights known at common law. This case does not involve a common law right. Johnson v. Stevenson, 170 Fed.2d 108 (5th Cir. 1948, cert. denied 336 U.S. 904). This contest is strictly a statutory right. The courts of this State have consistently held that in an election contest the contestants are not entitled to a trial by jury. Boroughs v. Williamson, 312 S.W.2d 717 (Tex.Civ.App.—El Paso 1958, writ dism'd); Rouw v. Harrington, 281 S.W.2d 746 (Tex.Civ.App.—San Antonio 1955, writ dism'd); 3 McDonald, Texas Civil Practice Section 11.02 (1970). Point of Error No. 5 is overruled.

The next contention is that the trial Court erred in dismissing the pro se Contestants at a hearing on a plea in abatement. None of those Contestants have filed an appeal bond, and they are not before this Court. The issue has not been preserved and the sixth point of error is overruled.

The seventh point contends the trial Court abused its discretion at the plea in abatement hearing. Again, the parties affected have not perfected an appeal and the point of error is overruled.

The last point of error asserts the trial Court erred in finding no irregularities occurred in the conduct of the bond election which rendered it impossible to determine the will of a majority of the voters. Giving the Contestants the benefit of the doubt and concluding

that there may have been in some instances a failure to strictly follow the provisions of the Election Code, there is no evidence of any election fraud, no evidence that the voters were deceived, and certainly no evidence that there were a sufficient number of improper or illegal votes cast as would have changed the results of the election as to any one of the three propositions submitted to the voters. In Little v. Alto Independent School District of Alto, Cherokee County, Texas, 513 S.W.2d 886 (Tex.Civ.App.—Tyler 1974, writ dism'd), the court considered a contest in a school bond election. In commenting upon the contentions that there had been a failure to strictly follow the Election Code, the court said:

> In general, the statutes regulating the manner of holding an election are directory and a departure from their provisions will not ordinarily invalidate an election, unless such departure affects or changes the results of the election. Hill v. Smithville Independent School District, 251 S.W. 209 (Tex. Com.App., 1923, opinion adopted); Kincannon v. Mills, 275 S.W. 1083 (Tex.Civ.App., Waco, 1925, writ ref'd); Baker v. Scranton Independent School District, 287 S.W.2d 210 (Tex.Civ.App., Eastland, 1956, n.w.h.); Minthorn v. Hale, 372 S.W.2d 752 (Tex.Civ.App., Beaumont, 1963, n.w.h.); Sawyer v. Board of Regents of Claredon Junior College, 393 S.W.2d 391

(Tex.Civ.App., Amarillo, 1965, n.w.h.). While it is true that statutory enactments concerning elections must be strictly enforced to prevent fraud, they must also be liberally construed in order to ascertain and effectuate the will of the voters. Turner v. Teller, 275 S.W. 115 (Tex.Civ.App., San Antonio, 1925, n.w.h.). Therefore this court cannot agree with appellants' contention that the trial court erred in concluding that there was no fraud in holding the election. There was no showing that any of the alleged irregularities affected or changed the results of the election. The mere fact that some directory provisions of the Election Code were not followed by the election officials would not by itself constitute fraud. Thompson v. Barnes, 309 S.W.2d 399 (Tex.Civ.App., Eastland, 1966, dism'd).

Point of Error No. 8 is overruled.

The judgment of the trial Court is affirmed.

July 25, 1979 PER CURIAM

No. 6900 — Robert Frias v. Board of Trustees of Ector County Independent School District, et al., from Ector.

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed that the judgment of the Court below be in all things affirmed; and that the appellees, Board of Trustees of Ector County Independent School District and W. M. Holm, Superintendent of Schools of such District, do have and recover of and from the appellant, Robert Frias, and his sureties, George Roeder and Van Canfield, all costs incurred by reason of this appeal, and this decision be certified below for observance.

[July 25, 1979]

COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT

El Paso, Texas, August 15, 1979

Hon. Gloria T. Svanas
Attorney at Law
1813 East Eighth Street
Odessa, Texas 79761

Madam:

You are hereby notified that, in the case of ROBERT FRIAS, Appellant, vs. BOARD OF TRUSTEES OF EC-

TOR COUNTY INDEPENDENT SCHOOL DISTRICT, et al., Appellees, our No. 6900, from Ector County, the following decision and order was this day made and entered by the Court:

The Honorable Court of Civil Appeals today rendered its order overruling Appellant's motion for rehearing.

(No opinion).

Respectfully yours,

ANNE D. RAY, Clerk.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, Oct. 3, 1979

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of

NO. B-8833: Robert Frias
vs.
Board of Trustees of Ector Co.
Independent School District et al.

was this day dismissed for want of jurisdiction.

Motion to advance is granted. No motion for rehearing will be entertained.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK, SUPREME COURT OF TEXAS
BOX 12248, CAPITOL STATION
AUSTIN, TEXAS 78711

AUSTIN, TEX. 78711 PM OCT 1979

10

THIS SIDE OF CARD IS FOR ADDRESS

Ms. Gloria T. Svanas, Atty
1813 East Eighth St.
Odessa, TX 79761

OCT. 6 1979

APPENDIX "B"

Vol. 9, Vernon's Annotated Texas Statutes Election Code

Article 5.01 Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under 18 years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Amended by Acts 1975, 64th Leg., p. 2082, ch. 682, §3, eff. Sept. 1, 1975. (1978-1979 Suppl).

Art. 9.30 Other contested elections

If the contest be for the validity of an election held for any other purpose than the election of an officer or officers in any county or part of a county or precinct of a county, or in any incorporated city, town, or village, any resident of such county, precinct, city, town, or village, or any number of such residents, may contest such election in the district court of such county in the same manner and under the same rules, as far as

applicable, as are prescribed in this chapter [arts. 9.01-9.38] for contesting the validity of an election for a county office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 158.

Art. 9.03 Notice of contest

Any person intending to contest the election of any one holding a certificate of election for any office mentioned in this law, shall, within thirty (30) days after the return day of election, give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest. By the "return day" is meant the day on which the votes cast in said election are counted and the official result thereof declared. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 131.

Art. 15.17 Corporation contributing

(a) In any election in this State or any district, municipality, or political subdivision thereof, wherein the question to be voted upon directly affects the granting, refusing, existence or value of any franchise granted to a corporation which has the right of eminent domain, such corporation may present facts and arguments to the voters bearing upon such question by any lawful means of publicity and pay the expense thereof; provided, however, that all such means of publicity employed shall contain a clear statement that the same are sponsored and paid for by such corporation;

and the use of any such means of publicity by such corporation which do not contain such statement shall subject such corporation to the penalties hereinafter provided. Provided that nothing in this subsection shall be construed as permitting any such corporation to directly or indirectly give, pay, expend, or contribute or promise to give, pay, expend, or contribute any money or thing of value in order to aid or hinder the nomination or election of any person to any public office in this State.

(b) If any corporation authorized by Section (b)[1] hereof, or if any person, partnership or association makes any expenditure or incurs any obligation directly or indirectly for the purpose of influencing an election of the character described in Section (b) hereof, it shall be the duty of such corporation, person, partnership or association to file with the governing body of the political subdivision in which such election is held and also with the Secretary of State by mail, not more than ten (10) days nor less than five (5) days before the date of such election and also within ten (10) days after the date of such election, itemized, verified accounts correctly showing as of the date of filing, the amounts of money and description and value of all things given, paid, extended and contributed and the names of the recipients thereof and all amounts of money and description and value of all things promised or obligated to be given, paid, expended, and contributed, and the names of the promisees thereof, by such corporation, person, firm or association, in connection with such election; all such accounts to be verified under oath by an officer of such corporation, or by such person or member of the partnership or association as the case may be; provided, however, that no such corporation, person, partnership or association may give, pay, expend, contribute or promise to give, pay, expend, or contribute money and things of value of the total amount exceeding Seven Hundred and Fifty Dollars ($750), or exceeding Twenty-five Dollars ($25) for each one hundred population of the district, municipality or political subdivision according to the last preceding Federal Census in which such election is held, whichever amount is greater; provided further that such amounts expended may not, in fixing rates to be charged by such corporation, be charged as operating cost or capital. Any corporation, person, partnership or association failing to file the accounts as provided herein or filing an account which is false in any material respect, or violating the limitation or expenditures provided herein, shall be subject to the penalties hereinafter provided, but in no event shall any such corporation be authorized to spend more than Ten Thousand Dollars ($10,000) in any one election.

(c) Any person who violates any provision of this article, or who, as an officer, director or employee of a corporation, or as a member of a partnership or association, authorizes or does any act in violation hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or be imprisoned not less than one nor more than five years, or be both so fined and imprisoned.

1 Now, Section (a) hereof.

Acts 1907, p. 169. Amended by Acts 1941, 47th Leg., p. 789, ch. 491, §4. Sec. (c) amended by Acts 1963, 58th Leg., p. 1017, ch. 424, §112. Amended by Acts 1977, 65th Leg., p. 743, ch. 276, §16, eff. Aug. 29, 1977.

(1978-79 Suppl).

Art 14.06 Corporations and Labor Organizations not to Contribute

(A) Except to the extent permitted in Section 317, Texas Election Code,[1] it is unlawful for any corporation, as defined in this Act, to make a contribution or expenditure, as defined in Section 237 of this code,[2] or any labor organization to make a contribution or expenditure, or for any candidate, office-holder, political committee, or other person to knowingly accept any contribution prohibited by this Article except as herein expressly provided.

(B) For the purpose of this section, "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

---

1 Article 15.17.

2 Article 14.01.

(C) As used in this section, the phrase "contribution or expenditure" shall also include giving, lending, or paying any money or other thing of value, directly or indirectly, to any candidate, or political committee, campaign treasurer, assistant campaign treasurer, or any other person, for the purpose of aiding or defeating the nomination or election of any candidate or of aiding or defeating the approval of any measure submitted to a vote of the people of this state or any subdivision thereof; provided, however, that nothing in this section or in Section 317, Texas Election Code, shall prevent the making of a loan or loans to any candidate, office-holder, or political committee, for campaign or other lawful purposes by any corporation which is legally engaged in the business of lending money and which has conducted such business continuously for more than one year prior to the making of such loan, provided the loan is made in the due course of business and is not directly or indirectly a contribution. As used in the chapter, the phrase "contribution or expenditure" shall not include expenditures for the following purposes: communications, on any subject, by a corporation to its stockholders and their families or, if the corporation is an association, to its members and their families, or by a labor organization to its members and their families; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or, if the corporation is an association, at its members and their families, or the establishment, administration and solicitation of contributions from the members and their families of one or more labor organizations, or

from the stockholders, employees and their families of one or more corporations, or from the members and their families of one or more associations to a separate segregated fund or other general purpose political committee to be utilized for political purposes by one or more corporations or one or more labor organizations. It is provided that it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, or financial reprisals, or by threats thereof, or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in a commercial transaction.

(D) Any corporation or labor organization making or promising a gift, loan, or payment to any candidate, political committeee, campaign treasurer, assistant campaign treasurer, or other person in violation of this section shall be civilly liable for double the amount or value of such loan or gift, promised or made, to each opponent of the candidate, or political committee, opposed by such gift, loan, or payment. An opponent of the candidate is an opposing candidate whose name appeared on the ballot in the election in which the unlawful gift, loan, or payment was involved. The corporation or labor organization shall be civilly liable to the State of Texas for an amount equal to triple the amount or value of any unlawful gift, loan, or payment to any candidate, office-holder, political committee, campaign treasurer, or assistant campaign treasurer.

(E) Any corporation or labor organization that violates Subsection (A), (B), or (C) of this section shall be guilty of a felony of the third degree.

(F) Every officer or director of any corporation or labor organization who shall consent to any such unlawful gift, loan, or payment or such unlawful promise to give, lend, or pay by the corporation or labor organization shall be guilty of a felony of the third degree.

(G) Any candidate, office-holder, political committee, campaign treasurer, or assistant campaign treasurer who knowingly accepts such unlawful gift, loan, or payment from a corporation or labor organization shall be guilty of a felony of the third degree.

Amended by Acts 1973, 63rd Leg., p. 1105, ch. 423, §8, eff. June 11, 1973; Acts 1975, 64th Leg., p. 2262, ch. 711, §8, eff. Sept. 1, 1975; Subsec. (C) amended by Acts 1977, 65th Leg., p. 737, ch. 276, §6, eff. Aug. 29, 1977.

(1978-79 Suppl).

MOTION FILED
NOV 19 1979

Supreme Court, U. S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-663

ROBERT FRIAS, ET AL,
Petitioners

v.

THE BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL,
Respondents

On Petition For Writ Of Certiorari To The Eighth Supreme Judicial District Court Of Civil Appeals Of Texas

RESPONDENTS' BRIEF IN OPPOSITION and RESPONDENT'S MOTION FOR DAMAGES

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On Petition For Writ Of Certiorari To The Eighth Supreme Judicial District Court Of Civil Appeals Of Texas

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE SAID HONORABLE COURT:

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas delivered on July 25, 1979, is now reported as Robert Frias v. Board of Trustees of Ector County Independant School District,

et al, 584 S.W.2d 944. Rehearing in said Court was denied August 15, 1979. The October 3, 1979, order of dismissal for want of jurisdiction by the Supreme Court of Texas is set out on page 17a of the Petition for Writ of Certiorari.

JURISDICTION

Petitioners allege jurisdiction under 28 U.S.C.A. § 1257(3). Respondents concede that if this Court has jurisdiction, such would exist only under § 1257(3). However, Respondents will demonstrate hereinafter that this Honorable Court has no jurisdiction in this case because (1) absolutely no federal question is necessary to the decision rendered by the Court of Civil Appeals, and (2) the only federal question in any way involved in the decision rendered by the Court of Civil Appeals (which was the holding that Art. 14.06, Texas Election Code, is unconstitutional insofar as it attempts to prohibit corporations from making contributions and expenditures for the purpose of aiding or defeating the passage of any measures submitted to the vote of the people of a political subdivision of the State of Texas) was clearly settled, contrary to Petitioners' contentions, by the previous decision of this Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978), reh. den. (U.S.) 57 L.Ed.2d 1150, 98 S.Ct. 3126.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in addition to the statutes set out in the petition for certiorari, the following portions of

Chapter Nine of the Texas Election Code, pursuant to the authorization of which this cause was prosecuted by Petitioners, to-wit: Texas Election Code Ann., Articles 9.01 - 9.02, - 9.04 - 9.29 and 9.31 (Vernon 1967). (Appendix A, infra, pages 1A-17A).

QUESTIONS PRESENTED

Respondents cannot accept the two "Questions Presented" set forth on pages 2-3 of the petition for certiorari, for the following reasons:

Concerning the first Question Presented, Petitioners have once again ignored the facts of this case and have inaccurately represented to this Court (without attempting to specify it) that somehow some "erroneous propaganda" was involved prior to the holding of this school bond election on December 5, 1978. Such statements are untrue, as the record in the case is void of evidence of any misrepresentations or misleading statements on the part of the school board and/or its employees, and the trial court and the Court of Civil Appeals expressly found that *no* material misrepresentations of fact or misleading statements were made. See pages 7a-8a of Appendix A of the petition for certiorari, wherein the Court of Civil Appeals quotes the pertinent Findings of Fact made by the trial court, and then holds that the evidence "supports those findings." See also Appendix B, infra, for the full Findings of Fact and Conclusions of Law of the trial court.

Likewise, in regard to Petitioners' second Question Presented, Petitioners base their question upon the incorrect assumption that Petitioners were prohibited from inquiring into alleged "intentional misrepresentation of

fact," *and* the equally incorrect assumption that such misrepresentations ever existed. Petitioners have ignored the fact that the trial court gave Petitioners every opportunity during a trial lasting almost a week to put on any evidence they desired regarding such alleged misrepresentations or misleading statements. Petitioners totally failed to introduce any evidence of misrepresentations or misleading statements, as was correctly found by the courts below. Although both courts below correctly held that such alleged misrepresentations cannot constitute a proper ground for a statutory election contest even if there had been evidence thereof, this holding was secondary, as no such misrepresentations were ever proved.

When examined in the light of the truth of the history of this case, Petitioners' Questions Presented do not present any questions for decision by this Honorable Court, and fall of their own weight. There are no federal questions involved.

In addition, the Questions Presented by Petitioners were not timely and properly raised. Understandably, Petitioners have failed to specify how such federal questions were raised, in violation of Rule 23(f) of the Rules of this Court.

STATEMENT

Although the "Statement" in the petition for certiorari is correct in some respects, it must not be accepted as accurate, in that Petitioners incorrectly state on page 6, that the school trustees "are spending tax dollars to proceed with the illegally authorized construction;" on page 7, that the pro se Contestants "proved" that intentional misrepresentations of fact had been made by the

school board, that "false information" was disseminated and published, and in assuming that any "misleading statements and misrepresentations of facts" ever existed.

Petitioners also make other remarks in their Statement which are untrue and argumentative, such as the remark on page 6 that "All property owners . . . are suffering excessive tax burdens . . . ," and the remark on page 8 that the factual circumstances of this case make the decision of this Court in *Bellotti* "inapposite". Respondents urge that such unfounded and argumentative statements not be accepted as facts. The Court is respectfully referred to the opinion of the Court of Civil Appeals (pages 2a-4a of Appendix A of the petition for certiorari) for a concise statement of the case.

ARGUMENT

Petitioners claim in their "Reasons for Granting the Writ" that their constitutional rights of equal protection were denied by the trial court's refusal to exclude from counting the votes cast by disenfranchised voters. There was *no evidence* presented in the trial that even one disenfranchised or illegal voter cast a ballot! The trial court correctly found there was no fraud involved in the election, and that no illegal or fraudulent votes were cast (Appendix B, page 1B, infra) much less a number sufficient to affect the results of the election. These findings have never been attacked by Petitioners. And, as pointed out by the Court of Civil Appeals in its opinion (Appendix A, page 8a, of petition for certiorari): "There is no proof of any fraud, and no voters testified that they were misled or believed what is now contended to be misrepresentations or that such affected their vote."

Petitioners claim they are constitutionally entitled to access to the courts to seek redress for the "admitted misrepresentations of facts by Respondents." Petitioners do not attempt to specify what these so-called "misrepresentations" were, because they cannot point out a single one. There *weren't any*, admitted or otherwise, even though over Respondents' strenuous objections Petitioners were allowed great latitude by the trial court to introduce any evidence they desired regarding misrepresentations, voter irregularities, etc., occurring before, during or after the day of election. The trial court's findings and conclusions in Appendix B, infra, were not only supported by all the evidence, they were *required* by it. It is inconceivable that Petitioners choose to ignore the facts of this case, and assume in arguing before this Honorable Court that the record is somehow replete with fraud and lies on the part of school personnel and community leaders. As the Court of Civil Appeals' opinion expressed it so well, even if it is not the law that the trial court's jurisdiction in a Texas statutory election contest is limited to matters happening on the day of the election and pertaining strictly to the election, the Petitioners arguments are nevertheless without merit, as they failed to meet their burdens of proof. Petitioners were afforded every judicial right of access they claim now to have been denied. Petitioners are ignoring this clear part of the history of this case.

Petitioners next claim the denial to them of a jury trial in this statutory election contest was a violation of Article I § 15 of the Texas Constitution. These Respondents cannot improve on the statement of the applicable law made by the Court of Civil Appeals in its

opinion (Appendix A, at page 12a, of the petition for certiorari) when in discussing this contention it stated:

> "The next point asserts the trial Court erred in denying Contestants' constitutional right of trial by jury. Both the Seventh Amendment to the United States Constitution and Article I, Section 15, of the Texas Constitution guarantee the right of a trial by jury. But those provisions were enacted to protect rights known at common law. This case does not involve a common law right. Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948, cert denied 336 U.S. 904). This contest is strictly a statutory right. The courts of this State have consistently held that in an election contest the contestants are not entitled to a trial by jury. Boroughs v. Williamson, 312 S.W.2d 717 (Tex. Civ. App.—El Paso 1958, writ dism'd); Rouw v. Harrington, 281 S.W.2d 746 (Tex. Civ. App.—San Antonio 1955, writ dism'd); 3 McDonald, Texas Civil Practice Section 11.02 (1970). Point of Error No. 5 is overruled."

Petitioners next attempt to argue that the courts below erred in holding unconstitutional the provisions of Art. 14.06 of the Texas Election Code which on their face would render illegal the corporate contributions here involved, and urge, due to the lack of "truthfulness" of the statements and representations made by school personnel, that *First National Bank of Boston v. Bellotti*, supra, has no applicability to the First Amendment exercises by the banks and business corporations here involved. Petitioners ignore the fact that the Attorney General of Texas, in Opinion H-1175 (1978) (page 11a of Appendix A to the petition for certiorari) had previously held invalid the proscriptions of such Art. 14.06, and that both courts

below also based their holdings on this authority. As pointed out above, this attempted distinction is without merit, as no untruthfulness was involved nor proven. Moreover, even had there been evidence of misrepresentations of school needs, etc., by school officials in the record, the Court of Civil Appeals nevertheless did not need to decide the question of the constitutionality of Art. 14.06 of the Texas Election Code vis a vis the *Bellotti* decision and Opinion H-1175 of the Attorney General of Texas. The decision of the trial court was based on two holdings: (1) the fact that Art. 14.06 was unconstitutional insofar as applicable to this election, and equally importantly, (2) that the making of contributions by banks and business corporations to a committee which supported passage of the bond election did not constitute a proper ground for a contest of such election, under applicable Texas law, as such matters are not within the Court's jurisdiction in a statutory election contest. Specifically, these two conclusions of law were as follows (Appendix B, pages 2B-3B, infra):

> "3. Contributions made by a national bank and Texas business corporations in support of passage of the December 5, 1978 bond election propositions are not illegal, and the statutory prohibitions thereto are unconstitutional by virtue of the decision of the Supreme Court of the United States in First National Bank of Boston, et al vs. Bellotti, 98 S.Ct. 1407 (1978), as confirmed by Opinion No. H-1175 by the Attorney General of the State of Texas.
>
> "4. The making, by a bank and Texas business corporations, of contributions in support of passage of the December 5, 1978 school bond election did not constitute a proper ground for a contest of such election, as such matters are not within the Court's jurisdiction, even if the statutory prohibitions to the making of such contributions are not unconstitutional."

It is clear that the decisions of the courts below are well based on distinct principles of Texas law, and any federal questions presented are not necessary to the determination and judgments rendered in the case. Of course, the traditional practice of this Court is to avoid decision of unnecessary constitutional issues and to refuse to decide constitutional questions when the record discloses other grounds of decision. *Alexander v. Louisiana,* 405 U.S. 625, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972); *Neese v. Southern Railway Company,* 350 U.S. 77, 100 L.Ed. 60, 76 S.Ct. 131 (1955). Although the Court of Civil Appeals saw no need to expressly confirm trial court Conclusion of Law 4 above, it clearly could have done so, as it did expressly confirm, in regard to alleged "misrepresentations," the Texas rule of law upon which such Finding 4 was based in the trial court, to-wit, that only such matters as happened on the day of the election and pertain strictly to the election itself are within the Court's jurisdiction and inquiry in a statutory election contest. (Appendix A, pages 4a-7a of the petition for certiorari.) This rule is sound when applied to the corporate contributions made to the independent Unite for Odessa committee, which were not received or used by Respondents. It is Texas law, even if Art. 14.06 were not unconstitutional, that corporation A cannot, by making contributions to political committee B, thereby (intentionally or otherwise) jeopardize the results of an election held by political subdivision C, by thereby creating a ground for a statutory election contest. If the law were otherwise, all

elections held in Texas would be subject to obvious but uncontrollable chicanery and chaos.

This cause involves no actual or threatened criminal prosecution against any bank or corporate contributor to such Unite for Odessa committee. The record is also void of any showing that such corporate advocacy had any significant influence on the bond election or threatened to undermine democratic processes. Although the fact that corporate "advocacy may persuade the electorate is hardly a reason to suppress it," *Bellotti,* supra, 435 U.S. at 790, 55 L.Ed.2d at 727, Petitioners nevertheless falsely state on page 11 of their Petition for Certiorari that "the same bond issues had failed to pass on three previous occasions." Petitioners know full well this is not true—they even conceded in their briefs in the courts below that such three previous bond elections involved propositions "not exactly in these amounts—and not for the exact purpose . . .".

CONCLUSION

For the reasons stated above, and because there are no special or important reasons for the granting of the Writ, Respondents say that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT B. COX
P. O. Box 1311
Odessa, Texas 79760
Counsel for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-663

ROBERT FRIAS, ET AL,
Petitioners

v.

THE BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL,
Respondents

On Petition For Writ Of Certiorari To The Eighth Supreme Judicial District Court Of Civil Appeals Of Texas

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RESPONDENT'S MOTION FOR DAMAGES

TO THE SAID HONORABLE COURT:

Respondent Board of Trustees of Ector County Independent School District respectfully moves the Court to award it reasonable damages, pursuant to Rule 56 of the Rules of this Court, for its delay by reason of the

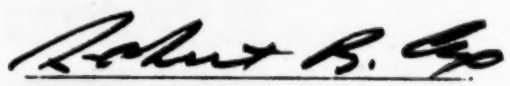
commencement and pendency of this proceeding, in the event that the Petition for Writ of Certiorari is denied.

The ground for this motion is that the petition is frivolous and was filed herein without any basis or ground for granting the same, as is more fully shown in Respondents' brief in opposition to such petition, supra.

A reasonable sum for damages for Respondents' delay is the sum derived by multiplying $6,337.46 times the number of days involved in this cause from October 3, 1979, (the date of final disposition of such cause in the Supreme Court of Texas) through final disposition of same by this Court, as is more fully shown in the affidavit of Charles L. Walker, Assistant Superintendent for Business Affairs for Respondent school district, set forth immediately following this motion.

Dated: November 12, 1979.

Respectfully submitted,



ROBERT B. COX
P. O. Box 1311
Odessa, Texas 79760
Counsel for Respondents

AFFIDAVIT

THE STATE OF TEXAS §
COUNTY OF ECTOR §

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES L. WALKER, known to me to be a credible person, who after being by me first duly sworn, on his oath deposes and says:

"I am the Assistant Superintendent for Business Affairs of the Ector County Independent School District, and reside in Odessa, Texas. I have been employed by such school district for 37 years. The Ector County Independent School District has its administrative offices in Odessa, Ector County, Texas, and this school district includes within its boundaries all of the County of Ector, State of Texas. Such district currently has an enrollment of approximately 23,250 students, and an annual budget of approximately $41,000,000.00.

On December 5, 1978, the Ector County Independent School District conducted an election for the purpose of authorizing such district to issue 21.6 million dollars in school bonds. Three propositions were submitted to the voters of Ector County, to-wit: Proposition No. 1 called for $8,807,000.00 in bonds to construct additions to, equip and remodel existing school buildings; to construct and equip a food service warehouse building; and to acquire land for sites for the food service warehouse and the transportation facilities building; Proposition No. 2 called for $9,293,000.00 in bonds for the site, construction and equipping costs of two elementary school buildings and one junior high school building; and Propo-

sition No. 3 called for $3,500,000.00 in bonds for the construction and equipping of a sports stadium complex. Proposition No. 1 was passed by the voters 9,030 to 8,007; Proposition No. 2 was passed 8,898 to 8,146; and Proposition No. 3 was passed 8,704 to 8,289.

Due to pendency of the election contests previously filed by Robert Frias, et al, in the 161st District Court of Ector County, and the appeals taken therefrom by these election contestants to the Court of Civil Appeals, the Supreme Court of Texas and the Supreme Court of the United States, it has been impossible for the Ector County Independent School District to sell any or all of these $21,600,000.00 in bonds approved at the December 5, 1978, election, or to proceed with the needed school improvements and construction projects so authorized by the voters (except for securing partial architectural services), which has caused serious detriment and damage to children attending school in the district. For example, students in at least one grade level of seven separate elementary schools are currently able to attend only half-day sessions of school, due to inadequate classroom space. One other elementary school has had to utilize nearby church-owned facilities, due to inadequate classroom space. These space and other educational inadequacies will be eliminated when the construction projects authorized in the bond election are completed.

Based upon what I consider to be very informed estimates, the inflation rate in the construction industry in the Ector County, Texas, area is now, and has been since December of 1978, at least 10-1/2% per year. The originally scheduled dates for awarding contracts on each of the twenty construction projects authorized at the bond

election ranged from January of 1979 through October of 1979.

If the litigation attacking such bond election were concluded at the present time, the dates which could be scheduled for awarding such contracts would range from February of 1980 through July of 1980, a delay of from nine to twelve months as to each contract, resulting in an increase from the original total cost estimates of such projects of $21,728,459.00 to the November 8, 1979, cost estimates thereof of $23,704,426.00; a total additional cost due to inflation of $1,975,967.00.

It is estimated that inflation is currently adding $6,337.46 per day of delay to the total costs of such construction projects, and that if such litigation is not concluded for six months following the date of this affidavit, that the May 8, 1980, cost estimates thereof will be $24,845,169.00; a total additional cost due to inflation of $3,116,710.00.

An emergency situation exists in regard to the need to be able to sell such bonds immediately, as the amount of such bonds submitted to the voters was conservatively set at $21,600,000.00, and it is now almost a certainty that the projects so authorized can not be conducted and constructed in the size and with the quality desired and originally contemplated, due to the $1,975,967.00 estimated loss of purchasing power of the bond proceeds. Inflation rates will further reduce the purchasing power of these bond proceeds if the delay is continued."

Charles L. Walker

CHARLES L. WALKER

THE STATE OF TEXAS §
COUNTY OF ECTOR §

SWORN TO AND SUBSCRIBED before me by the above named CHALES L. WALKER, on this the 16th day of November, 1979, to certify which witness my hand and seal of office.

Jessie Ballard
Notary Public in and for
ECTOR COUNTY, TEXAS

(SEAL)

CERTIFICATE OF SERVICE

I, ROBERT B. COX, Attorney for Ector County Independent School District and W. M. Holm, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on November 17, 1979, I served three copies of the foregoing Respondents' Brief in Opposition and Respondents' Motion for Damages on Robert Frias, et al, petitioners herein, by depositing such three copies in a United States mail box, in a duly addressed envelope, with first class postage prepaid, to Gloria Tanner Svanas, attorney of record for petitioners, at 1813 East Eighth Street, Odessa, Texas, 79761.

Robert B. Cox
ROBERT B. COX

APPENDIX A

Article 9.01 District court, jurisdiction and venue

The district court shall have original and exclusive jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature.

The venue of suits or contests between candidates for any office to be filled by the choice of voters of the entire state shall be in Travis County. The venue of suits or contests between candidates for any justice of any Court of Civil Appeals shall be in the county where said Court of Civil Appeals has its sittings.

The venue in all other election contests between candidates shall be in the county where the candidate receiving the certificate of election resides. If there is but one district court in the county in which venue is placed by this law and the judge of said court is disqualified to hear any contest, said judge shall be replaced for purposes of said contest in the manner provided by law for civil suits.

Nothing herein shall be construed to prohibit the district court in the county where any such contest may be filed from changing the venue to some adjacent county, upon showing of adequate cause. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 129.

Art. 9.02 Contest or prosecution by Attorney General

(1) In any special, general, or primary election in this State for any office, national, state, district, county, precinct, school, or municipal, or any election on any proposition, the Attorney General of Texas, in the case of elections involving two (2) or more counties, and the district and county attorneys, in the case of elections involving less than two (2) counties, may on their own motion, and shall when allegations of election frauds are presented to them by written affidavit of two (2) or more reputable citizens, investigate the conduct of such election and the making, canvassing, and reporting of returns. To make effective the power of such officers to investigate, the Attorney General, in elections involving two (2) or more counties, and the district and county attorneys in all other elections, are hereby authorized to impound all of the election records in the hands of any county clerk, district clerk, or any other election official by applying for and obtaining an order of a district court placing such records in the custody of the court to be examined by such officers in the presence of the district judge or a grand jury. All of such records, except the stub box, shall be subject to inspection and examination by the attorneys for the State in the cases hereby placed within their respective jurisdictions. The stub box containing identification of the individual voters shall not be opened or inspected by anyone except as otherwise provided in this Act with reference to election contests and in a grand jury room when alleged violations involve the contents of said box.

The application for impoundment and inspection of records shall be filed with the district court of a county

in which the election was held, or an adjoining county, or Travis County in the case of state-wide elections, and the judge of said court shall immediately issue an order impounding such records in a vault or other secure place under such terms and conditions as will keep the records under his custody and control during the entire examination and inspection proceeding and for such additional time as he may direct. The ex parte proceeding herein provided for inspection in the presence of the judge shall be conducted in the usual manner as a court of inquiry, and the court shall issue such processes for witnesses and records relevant to the conduct of such election as may be requested by the appropriate attorney for the State, and disregard of subpoenas or other processes or refusal to testify at such hearing shall be punished by the court as in civil cases.

(2) The summary court proceeding and venue set out in subsection (1) above may be followed in the investigation and development of evidence relating to all other alleged violations of the Texas election laws. The Attorney General of Texas is hereby authorized to appear before a grand jury and prosecute any violation of the election laws of this State by any candidate, election official, or any other person, in state-wide elections, or elections involving two (2) or more counties. He may institute and maintain such prosecution alone or in conjunction with the county or district attorney of the county where such prosecution is instituted. He may call upon and direct county and district attorneys to handle the investigations and prosecutions provided for above or to assist him in such procedures. This Section is intended to be cumulative and in addition to all other prosecutions authorized by other Sections hereof and other statutes. Concurrent venue

for indictments and prosecutions under this Section shall be in the county where the election law violation occurred, or an adjoining county, or in Travis County if the violation involves or relates to a state-wide election for any State or national office or any proposition submitted to the people.

(3) Any subpoena or subpoena duces tecum issued by the clerk of any district court for any hearing, election contest, or election law violation shall be effective if served anywhere within this State, provided, however, no witness shall be punished for failure to comply with such subpoena or subpoena duces tecum unless the fees provided by law are tendered him as required by statute or court rule. When called upon by the Attorney General, the Department of Public Safety and Texas Rangers shall serve any subpoenas and assist in any investigations which may be necessary.

(4) The expense of any investigation on the part of the Attorney General of an election law violation shall be paid by the State of Texas. There is hereby appropriated for the biennium of 1951-52 the sum of Five Thousand Dollars ($5,000) out of funds not otherwise appropriated from which such expenses may be paid. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 130.

Art. 9.04 Reply to notice of contest

The person holding such certificate shall, within ten (10) days after receiving such notice and statement, deliver, or cause to be delivered, to said contestant, his agent or attorney, a reply thereto in writing. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 132.

Art. 9.05 Service of notice

The notice, statement and reply required by the two preceding articles may and shall be served by any person competent to testify, and shall be served by delivering the same to the party for whom they are intended in person, if he can be found in the county, if not found, then upon the agent or attorney of such person, or by leaving the same with some person over the age of sixteen (16) years at the usual place of abode or business of such person. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 133.

Art. 9.06 Where to file papers

If the contest be for the validity of an election for any State office, except the offices provided for in Section 155 [art. 9.27], or for any district office, except Members of the Legislature, or for any county office, a copy of the notice and statement of the contestant and of the reply thereto of the contestee served on the parties shall be filed with the clerk of the court having jurisdiction of the case. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 134.

Art. 9.07 Cause to have precedence

When the notice, statement and reply have been filed with the clerk of the court, he shall docket the same as in other causes, and the said contest shall have precedence over all other causes. If the office contested for be that of district clerk, then a clerk pro tem shall be appointed as is provided by law in suits where the clerk is a party to the suit. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 135.

Art. 9.08 Evidence and procedure

In trials of all contests of election, the evidence shall be confined to the issues made by the statement and reply thereto, which statement and reply may be amended as in civil cases. As to the admission and exclusion of evidence, the trial shall be conducted under the rules governing proceedings in civil causes. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 136.

Art. 9.09 To execute bond

Whenever the validity of any election for an officer other than for Members of the Legislature is contested, the contestee shall, within twenty (20) days after the service of said notice and statement of such contest upon him, file with the clerk of the court in which such contest is pending a bond with two (2) or more good and sufficient sureties, payable to the contestant, to be approved by said clerk, in an amount to be fixed by said clerk, and not less than double the probable amount of salary or fees or both, as the case may be, to be realized from the office being contested for a period of two (2) years; conditioned that, in the event the decision of the contest shall be against such contestee and in favor of the contestant, such contestee will pay over to such contestant whatever sum may be adjudged against him by a court having jurisdiction of the subject matter of such bond. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 137.

Art. 9.10 Failure to fiie bond

If the contestee fails to file the bond as required in the preceding Section [art. 9.09], and within the time therein prescribed, said clerk shall notify the contestant immedi-

ately of such failure; and such contestant shall have the right within ten (10) days after such notice, to file a like bond payable to the contestee, conditioned that, in the event the decision of the contest is against him and in favor of the contestee, he will pay over to such contestee whatever sum may be adjudged against him, the said contestant, by a court having jurisdiction of the subject matter of such bond. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 138.

Art. 9.11 Execution of bond by contestant certified

Immediately upon the filing of said bond by the contestant, the clerk shall certify in writing, and under his official seal, to the Governor, that the contestee failed to give the required bond, and that the contestant has given such bond in accordance with law. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 139.

Art. 9.12 To commission contestant

Upon receiving such certificate from the clerk, the Governor shall issue a commission to the said contestant for the office in controversy pending such contest; and thereupon the contestant, upon qualifying in said office as required by law, shall exercise all the rights and powers and perform all the duties of said office for the full term thereof unless it shall otherwise be determined and ordered by the court upon the trial of such contest. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 140.

Art. 9.13 Failure of contestant to execute bond

The Governor shall issue the commission to the contestee at the time provided by law as in other cases, unless

he has been notified of the failure of such contestee to file the bond required by Section 137 [art. 9.09], in which event the Governor shall withhold the issuance of such commission until after the time allowed the contestant to file such bond has elapsed; but, if the said contestant shall also fail to file bond as provided in Section 138 [art. 9.10], and within the time therein required, the clerk shall certify all the facts in the case, under his official seal to the Governor, who shall thereupon issue the commission to the contestee. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 141.

Art. 9.14 Fraudulent vote not counted

If any vote or votes are found upon the trial of any contested election to be illegal or fraudulent, the trial court shall subtract such vote or votes from the poll of the candidate who received the same, and after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 142.

Art. 9.15 Election declared void

If it appears on the trial of any contest provided for in Section 134 [art. 9.06] that it is impossible to ascertain the true result of the election as to the office about which the contest is made, either from the returns of the election or from any evidence within reach or from the returns considered in connection with other evidence, or should it appear from the evidence that such a number of legal voters were, by the officers or managers of the election, denied the privilege of voting as, had they been allowed to vote, would have materially changed the result, the

court shall adjudge such election void, and direct the proper officers to order another election to fill said office; which election shall be ordered and held and returns thereof made in all respects as required by the general election laws of the State. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 143.

Art. 9.16 Bonds subject to suit

The bonds required to be filed by the contestant and contestee under the provisions of this chapter [arts. 9.01-9.38] shall remain on file in the office of the clerk where filed, and may be sued upon as other bonds. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 144.

Art. 9.17 Appeal available

Either the contestant or contestee may appeal from the judgment of the district court to the Court of Civil Appeals, under the same rules and regulations as are provided for appeals in civil cases; and such cases shall have precedence in the Court of Civil Appeals over all other cases. In cases of appeal as provided for in this Section [this article], the clerk shall, without delay, make up the transcript and forward the same to the clerk of the Court of Civil Appeals for that district. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 145.

Art. 9.18 Taxing costs

The costs in all contested election cases shall be taxed according to the laws governing costs in civil cases, except when otherwise specially provided, and bond for cost may be required as in civil suits. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 146.

Art. 9.19 Measure of damages

Where the contest shall have been decided against one of the parties and the other party shall have filed a bond and performed the duties of the office under the provisions of this chapter [arts. 9.01-9.38], the bond so filed shall inure to the benefit of the successful party in any suit thereon in a court having jurisdiction of the amount in controversy; and the measure of damages recoverable, besides cost of suit, shall be the salary, fees, and emoluments of office of which he has been deprived, less such reasonable expenses as the party holding the office shall have incurred in executing the duties of the office; provided that he shall have acted in good faith in receiving the certificate of election or commission for the office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 147.

Art. 9.20 For Legislature

Initiation of election contest

Section 1. A candidate for State Senator or Representative may initiate election contest proceedings at any time after the returns have been deposited in the office of the county clerk of every county comprising the district as provided in Articles 119, 123, and 124 of this code, but not later than 30 days after the date of the election.

Notice and statement

Sec. 2. The contestant initiates election contest proceedings by giving notice in writing to the candidate who is shown by the returns to have the greatest number of votes when the returns of all counties are totaled, and by

delivering to him, his agent or attorney, a written statement of the grounds on which the election is contested. Within the same period of time, the contestant shall mail a certified copy of the notice and statement to the President of the Senate or to the Speaker of the House of Representatives, as the case may be, in care of the Secretary of State.

Reply

Sec. 3. The candidate who receives the notice and statement shall cause a reply in writing to be delivered to the contestant, his agent or attorney, within 10 days after receiving the notice and statement; and within the same period of time he shall mail a certified copy of the reply to the President of the Senate or to the Speaker of the House of Representatives, as the case may be, in care of the Secretary of State.

Service; use of certified mail

Sec. 4. (a) The notice, statement, and reply may be served as provided in Article 133 of this code, or by certified mail with return receipt requested.

(b) When certified mail is used for service or to transmit a copy of the notice, statement, or reply to the Secretary of State, the fact and date of sending and the fact and date of receipt may be proven with window receipts and return receipts for certified mail.

Duty of Secretary of State

Sec. 5. (a) If the contest involves the result of a general election, the Secretary of State shall submit the papers of the case to the President of the Senate or to the

Speaker of the House of Representatives, as the case may be, on the second Tuesday in January following the election. The papers of the case consist of the copies of the notice, statement, reply, and the Secretary of State's certified statement of the total votes cast for each candidate for the office as shown by the official canvass of the returns.

(b) If the contest involves the result of a special election, and the Legislature is not in session when he receives the notice, statement, and reply, the Secretary of State shall submit the papers on the opening day of the first legislative session to be convened after the date of the election; and if the Legislature is in session when he receives the notice, statement, or reply, he shall submit the papers within three days after the day he receives the copy of the reply.

Art. 9.21 Depositions taken

At any time after filing said papers with said returning officer, either party to said contest may proceed, at his own expense, to take such written testimony as he may deem proper, having first served the opposite party, his agent or attorney, with a copy of the interrogatories he intends to propound to each witness, and the name of the officer before whom the same will be answered as well as the time and place of taking such testimony. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 149.

Art. 9.22 Who may take such depositions

Any officer authorized by the law of this State to administer oaths, upon being satisfied as to any costs, including his own fees, that may accrue in the taking of

such testimony, shall proceed upon the application of the party desiring it, to summon the witness or witnesses named in the interrogatories and take his or their answers in writing and under oath to such interrogatories and cross interrogatories as may be propounded in writing. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 150.

Art. 9.23 How depositions may be returned

The answers of each witness shall be reduced to writing and signed by such witness, and sworn to by such witness before the officer taking the same, and shall be certified to by such officer and sealed in an envelope; and the name of said officer shall be written by him across the seals; and he shall forward the same without delay by mail or other safe conveyance to the President of the Senate or Speaker of the House of Representatives, as the case may be, to the care of the Secretary of State, at the seat of government. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 151.

Art. 9.24 Referred to committee

The notice and statement of contest and the other papers pertaining thereto shall immediately after the organization of the Legislature be opened by the President of the Senate or by the Speaker of the House of Representatives, as the case may be; and the same shall be referred to the committee on privileges and elections of the House in which the contest is pending, which committee shall proceed without delay to fix a time for the hearing of said case, and, after due notice to the parties thereto shall investigate the issues between said parties, hearing all the legal evidence that may be presented to said committee, and shall as soon thereafter as practicable

report their conclusions of law and fact in respect to said case to the House by which said committe was appointed, accompanied by all the papers in the cause, and the evidence taken therein, with such recommendations as may to them seem proper. Any one or more of the committee dissenting from the views of the majority may present a minority report. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 152.

Art. 9.25 Hearing by committee

The rules of evidence and the laws in force respecting the admissibility of evidence, the taking of depositions and the issuance and service of process in the district courts of this State shall be observed by said committee, so far as the same may be applicable. Said committee shall have the power to send for persons and papers, and the chairman of said committees shall have the power to issue all process necessary to secure the attendance of witnesses and the production of papers, ballot boxes and other documents before said committee and such process shall be executed by the sergeant-at-arms of the House in which the contest is pending, or by such other person as the presiding officer of said House may designate. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 153.

Art. 9.26 Procedure by House

The House in which the contest is pending shall, as soon as practicable after the report of the committee has been received, fix a day for the trial of the contest, and shall proceed to determine whether the contestant or contestee, or either of them, is entitled to the contestant's seat; provided, the said House may hold the election void after full consideration of all the evidence and for the

reasons prescribed in Section 143 [art. 9.15] and in such case the Governor shall at once be notified of the vacancy. Such fees shall be paid to the witnesses and the officers serving the process as shall be prescribed by the rules of the House in which said contest is pending, and no mileage or per diem shall be paid to either of the parties to said contest until said case is determined, and in no case shall any mileage or per diem be paid to any party against whom any contest is decided. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 154.

Art. 9.27 Contest for State office

If the contest be for the validity of any election for Governor, Lieutenant Governor, Comptroller, State Treasurer, Land Commissioner or Attorney General, the same shall be tried and determined by both Houses of the Legislature in joint session, and the provisions of this chapter [arts. 9.01-9.38] governing in case of a contest for the validity of an election for members of the Legislature shall apply to and govern in a contest for the office above named, as far as applicable. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 155.

Art. 9.28 United States Senator

If the nomination of any candidates for United States Senator be contested, the same shall be conducted under the provisions of the law regulating contests for Governor. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 156.

Art. 9.29 For Presidential electors

Any person intending to contest the election of any or all of the persons duly declared elected as electors of

president and vice-president, shall within ten (10) days from the said fourth Monday in November, file with the Secretary of State a written statement of the ground on which such contestant relies to sustain such contest, and shall within such time, notify the contestee thereof in writing, and deliver to him, his agent or attorney, a copy of said statement. The contestee shall, within eight (8) days after receiving such notice, file with the Secretary of State his reply thereto in writing. The contest shall, as soon thereafter as possible, be tried and determined by the State Board of Canvassers, consisting of the Governor, one (1) citizen of the state, appointed by the Governor with the advice and consent of the Senate, who shall serve for a term of two (2) years, and Secretary of State, or any two (2) of them; and their decision shall be rendered at least two (2) days before the time fixed by law for the meetings of the electors. Such decision, in which two (2) at least of such Board shall join, shall be final, and certificates of election, in accordance therewith shall at once be issued by the Secretary of State to the proper parties. Where not otherwise herein provided, the provisions of law relating to contests for the validity of an election for members of the Legislature shall apply to such contests for presidential electors. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 157; Acts 1963, 58th Leg., p. 1138, ch. 442, § 14.

Art. 9.31 Parties defendant

In any case provided for in the preceding Section [art. 9.30], the county attorney of the county, or if there is no county attorney, the district attorney of the district, or the mayor of the city, town or village, or the officer who

declared the official result of said election, or one of them, as the case may be, shall be made the contestee, and shall be served with notice and statement, and shall file his reply thereto as in the case of a contest for office; but in no case shall the costs of such contest be adjudged against such contestee, or against the county, city, town, or village which they may represent, nor shall such contestee be required to give bond upon an appeal. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 159.

APPENDIX B

CONSOLIDATED CAUSE
No. B-54,127

IN THE DISTRICT COURT OF
ECTOR COUNTY, TEXAS
161ST JUDICIAL DISTRICT

ROBERT FRIAS, ET AL,

v.

BOARD OF TRUSTEES OF ECTOR COUNTY
INDEPENDENT SCHOOL DISTRICT, ET AL

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above captioned election contest came on for trial before the Court without a jury on March 13, 1979. The Contestants were present in person and each as attorney pro se, and the Contestees were present in person and by their attorneys. After considering the pleadings, the evidence, and arguments presented by and on behalf of the parties, judgment in such cause was signed and entered on March 19, 1979. The Court, in response to a request from the attorney for Contestants, makes its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. This cause is a statutory election contest.

2. No material misrepresentations of fact or misleading statements were made by Contestees or the employees of such school district prior to the December 5, 1978 school bond election.

3. There was no fraud involved in the December 5, 1978 school bond election.

4. There were no illegal or fraudulent votes cast in the December 5, 1978 school bond election.

5. It is not impossible to ascertain the true and correct results of the December 5, 1978 school bond election.

6. No legal voters were denied the privilege of voting as, had they been allowed to vote, would have materially changed the results of the December 5, 1978 bond election.

7. No irregularities occurred in the conduct of such December 5, 1978 bond election such as to render it impossible to determine the true will of a majority of the qualified voters participating.

CONCLUSIONS OF LAW

1. Misleading statements and misrepresentations of facts by Contestees and school district employees alleged to have occurred prior to the December 5, 1978 bond election do not constitute any proper grounds for an election contest, as only such matters as happened on the day of the election and pertain strictly to the election itself are within the Court's jurisdiction and may be inquired into or determined by the Court in an election contest.

2. Contestants were not entitled to a trial by jury.

3. Contributions made by a national bank and Texas business corporations in support of passage of the December 5, 1978 bond election propositions are not illegal, and the statutory prohibitions thereto are unconstitutional

by virtue of the decision of the Supreme Court of the United States in First National Bank of Boston, et al vs. Bellotti, 98 S.Ct. 1407 (1978), as confirmed by Opinion No. H-1175 by the Attorney General of the State of Texas.

4. The making, by a bank and Texas business corporations, of contributions in support of passage of the December 5, 1978 school bond election did not constitute a proper ground for a contest of such election, as such matters are not within the Court's jurisdiction, even if the statutory prohibitions to the making of such contributions are not unconstitutional.

5. The December 5, 1978 bond election and the results thereof are in all things valid and upheld; such results being the passage of all three propositions submitted to the voters.

SIGNED this 2nd day of April, 1979.

/s/ J. H. STARLEY
J. H. Starley, Judge Presiding